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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 528

THE LOGIN CORPORATION (a corporation),
Petitioner,

vs.

PAUL A. PORTER, Administrator, Office of Price Administration,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

FRANCIS V. KEESLING, JR.,
315 Montgomery Street, San Francisco 4, California,
Attorney for Petitioner.

FRANCIS CARROLL,
315 Montgomery Street, San Francisco 4, California,
Of Counsel.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner followed the enlightened procedure suggested by Rule 76 of the Rules of Civil Procedure —apparently a fatal error in the Ninth Circuit—with this result to the petitioner's appeal from a judgment

of the District Court: the Circuit Court of Appeals refused to decide the question submitted to it by the Agreed Statement under the Rule, and affirmed the judgment, contrary to the agreement of the parties, on grounds which had been eliminated from the issues by the Agreed Statement; were never at issue in the trial Court and were never mentioned in the oral argument or the briefs on appeal. It respectfully prays that a writ of certiorari may issue to review the decree of the Circuit Court of Appeals for the Ninth Circuit rendered in the case between the above named parties docketed therein as No. 11,151.

The transcript of the record has already been filed with the Clerk of the Court.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is printed in the record (R. 38) and is reported in 155 Fed. (2d) 623. (No opinion was rendered on the denial of the petition for a rehearing.)

JURISDICTION.

This Court has jurisdiction to review the decree of the Circuit Court of Appeals by virtue of Judicial Code, Section 240, as amended, U.S.C.A. Title 28, Section 347.

This application is made within three months after the denial of the petitioner's petition for a rehearing

by the Circuit Court of Appeals on June 24, 1946. The petition for a rehearing was filed within the time allowed therefor by Rule of Court. (R. 44.)

SUMMARY AND STATEMENT OF MATTER INVOLVED.

The respondent, Price Administrator, filed a complaint in the United States District Court charging that the petitioner, hereinafter referred to as "Login", made sales of Cuban lobster at prices in excess of those permitted by the General Maximum Price Regulation. (7 Fed. Reg. 3153.) Login admitted making the sales as selling agent for a Cuban corporation; denied any violation of the Regulation and demanded a jury trial on all issues. Judgment was entered against Login for the amount of the overcharges.

Login appealed. It did not present a complete record under Rule 75. Instead the parties entered into an Agreed Statement of the Case (R. 2 to 21) under Rule 76, which was approved by the trial Court and certified to the Appellate Court. It thus became the record on appeal under the provisions of Rule 76, on which the appeal was decided by the Circuit Court.

The record before the Circuit Court—the Agreed Statement—showed these matters:

It stated the question at issue in the case (R. 14, 20)—in effect, whether Login had acted as a selling agent.

It then stated the agreement of the parties—that if Login *was* a selling agent the transaction was not subject to price control.

> "If they were such (purchases by persons dealing with a selling agent) *the transaction* (the sale of the lobster) *was not subject to price control.*" (R. 15—matter in parentheses, and emphasis, petioner's.)
>
> (This *agreement of the parties,* the opinion of the Circuit Court of Appeals refers to, as "the *appellant's contention*". The reasons for this petition thus are not apparent from a reading of the opinion.)

It shows the ruling of the trial Court on this question and the stipulated facts on which its ruling was based. (R. 3-10.) Its ruling was that Login as a matter of law was *not* a selling agent and that the sales therefore were subject to price control. (R. 15.) As a result of this order the Court then ruled that no question of fact remained for a jury and entered judgment against Login. (R. 18, 19.) (The parties had stipulated to the amount o sales and that the violation, if any, was not wilful—the only other questions remaining at issue after the Court's ruling.)

The sole question on appeal was whether the trial Court ruled correctly on the question of agency. (R. 14, 15, 20.) The briefs and oral argument of both parties were directed solely to this point:

From the *petitioner's* brief:

> "The question involved on the appeal is whether the court erred in ruling that Login as a matter of law was not a selling agent."

From the brief of the *respondent* Price Administrator:

> "The issue is as is stated in Appellant's Brief, whether these sales in December were made by Login as an independent seller * * *, or were made by Login as selling agent of the foreign seller * * *"
>
> "The parties having stipulated as to all the material facts, the sole issue left was whether from the facts shown the legal status of selling agent was made out, * * * and the resolution of this question was for the court, not the jury."

To the equal surprise of counsel for both parties the Circuit Court of Appeals refused to determine this question; completely disregarded the agreement in the record that the sales were not subject to price control if Login were a selling agent; referred to this agreement as "the appellant's contention" and ruled, directly contrary to it, that "regardless of whether or not appellant was the selling agent of a foreign seller" the sales were subject to price control.

The opinion gives no reason for the Court's action. Login's petition for a rehearing was denied without any opinion.

The Court affirmed the judgment on the grounds that the Maximum Import Price Regulation exempted only goods *to be* imported, and purchases made *directly* from a selling agent and that the record did not show that these requirements were met by Login.

These questions were not before the Court. In fact they had been eliminated as issues by the agreement of the parties on appeal that the sales were not subject to price control if Login were an agent—the one question to be decided on appeal. The record, prepared in reliance on this agreement, was not directed to these issues.

Consequently the Circuit Court has not only refused to decide the question submitted to it, but has affirmed the judgment on questions never in issue either in the trial Court or on appeal and as to which the petitioner has never been heard, although it has demanded a jury trial on all issues.

Petitioner believes the Court's interpretation of the Maximum Import Price Regulation to be erroneous and its statement of the facts regarding the time of importation of the goods to be in error.

If the case is to be decided on different questions than those agreed upon by the parties, petitioner is entitled to the opportunity to be heard on them in trial.

THE QUESTIONS PRESENTED.

1. May not the parties to a statement of the case under Rule 76 of the Rules of Civil Procedure specify the principal question decided in the lower Court; agree that liability of the appellant turns upon it and secure a review of the trial Court's ruling on that question and a reversal or affirmance of the judgment

there entered in accordance with the correctness of the trial Court's ruling?

(Specifically, may not the parties here having agreed there is no liability if Login were a selling agent, secure a review of the trial Court's ruling that Login as a matter of law was *not* a selling agent, and a reversal or affirmance of the judgment according to the correctness of the ruling?)

2. In such a situation is it not error for the Circuit Court to disregard the agreement of the parties that appellant was not liable if the question specified be determined in his favor, and to affirm the judgment on other issues never before raised in the proceedings?

(Specifically, the parties having agreed on appeal the transaction was *not* subject to price control if Login were a selling agent, is it not error for the Court to rule they were subject to price control regardless of whether it was a selling agent?)

3. In such a situation, is it not sufficient that the record show the facts material to the question specified, and is it not error for the Circuit Court to require the record to show other facts material only to other issues not presented by the statement and never raised by the parties?

(Specifically, is it not error for the Circuit Court to affirm the judgment because the record allgedly did not show that the merchandise was *to be* imported and that the dealing was *directly* with Login, the parties having agreed the only question at issue to be was Login a selling agent?)

4. In the event this Court grants this petition and reviews the decree:

Do not the facts stated in the Agreed Statement show Login, as a matter of law, to have acted as a selling agent so that the judgment of the District Court should be reversed and judgment entered in favor of the petitioner?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

1. The decision of the Circuit Court of Appeals decides an important question of federal procedural law for litigants proceeding under Rule 76 of the Rules of Civil Procedure which has not been, but which should be settled by this Court. Unless the matter is clarified by this Court no litigant may know whether he may safely, by taking advantage of the provisions of Rule 76, limit the question to be decided on appeal and limit the record to the facts necessary to a decision of this question. In fact, if a Circuit Court of Appeals may disregard an agreement of the parties as to the facts in the agreed statement; label it as a "contention of the appellant" and decide the case contrary to the agreement, your petitioner doubts that any litigants in the Ninth Circuit will feel free to avail themselves of the provisions of the rule. The saving of time of Court and litigant which might have been realized under the Rule will thus be lost.

2. The decision of the Circuit Court of Appeals that "*regardless of whether* the petitioner was an

agent", the transaction was subject to price control in the face of the agreement of the parties in the record on appeal that the transaction was *not* subject to price control if it *were* an agent; its refusal to review the ruling of the trial Court on this question, and its affirmance of the judgment against the petitioner on other grounds eliminated by the parties and never raised in the lower Court, nor in the briefs, nor in oral argument, thus depriving the petitioner of the opportunity of meeting these grounds despite its demand for a jury trial on all issues, so far departs from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power of supervision.

Wherefore, petitioner prays that a writ of certiorari be granted to review the judgment of the Circuit Court for the Ninth Circuit.

Dated, San Francisco, California,
September 20, 1946.

FRANCIS V. KEESLING, JR.,
Attorney for Petitioner.

FRANCIS CARROLL,
Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

COURT OF APPEALS DECISION.

The opinion is reported in 155 F. (2d) 623, and is set forth in the record at page 38.

JURISDICTION.

The decision of the Circuit Court of Appeals in this case became final on June 24, 1946, the date of the denial of the petitioner's petition for a rehearing.

This application is made within three months of that date.

STATEMENT OF THE CASE.

In the interest of brevity a statement of the case is not here repeated.

SPECIFICATION OF ERRORS.

The petitioner believes that the errors it believes were made by the Circuit Court of Appeals have been fully set forth in the petition. They therefore are not here repeated.

SUMMARY OF ARGUMENT.

A. The agreement of the parties in the Agreed Statement under Rule 76 was that the transaction was not subject to price control if Login were a selling agent. The opinion of the Court affirms the judgment against the petitioner contrary to the agreement.

B. An important question regarding the Rules of Civil Procedure is decided by the decision of the Circuit Court of Appeals.

A. THE AGREEMENT OF THE PARTIES IN THE AGREED STATEMENT UNDER RULE 76 WAS THAT THE TRANSACTION WAS NOT SUBJECT TO PRICE CONTROL IF LOGIN WERE A SELLING AGENT. THE OPINION OF THE COURT AFFIRMS THE JUDGMENT AGAINST THE PETITIONER CONTRARY TO THE AGREEMENT.

This case had been reduced to one issue by the parties, namely, was Login a selling agent.

It was to this question that the parties stipulated as to facts in the lower Court. It was on this issue the trial Court ruled.

> "At a pretrial conference the trial judge ruled that the defendant Login was not the 'selling agent' of the Cuban corporation, and that the sales therefore were subject to price control." (R. 15.)

It was the correctness of *this* ruling which was submitted to the Court for review.

The issue was never whether the dealings with Login were direct, or indirect, or whether the goods were imported before or after the sale—the best proof of the latter fact being that the facts stipulated to, otherwise detailed (R. 3 to 10), does not even mention the day or month of arrival of the goods in this country or whether it preceded or succeeded the sales —certainly the most easily ascertainable fact of all those upon which the parties finally reached an agreement.

It was not on such issues that the Court ruled. There was no ruling that the lobster was imported before the sales, and the sales were therefore subject

to price control. Nor that the dealings were not "directly" with the agent and therefore subject to price control. There was no such ruling and consequently no review of such a ruling sought by the parties. The record on appeal was not prepared to attack such a ruling.

Nor was the agreement of the parties that the transaction was not subject to price control if the dealings were "direct" with Login, nor was it that they were not subject to price control if the goods were *"to be"* imported. Nor was it that they were not subject to price control only if the transaction fell within all the provisions of the Maximum Import Price Regulation.

The agreement was simply that if Login was a "selling agent", within the meaning of that Regulation, the sales were not subject to price control. While the question, and the agreement regarding it, may not be stated with nicety in the Agreed Statement, the actions of the respondent Price Administrator himself leave no question on this score. It is a party to the Agreed Statement. It has never questioned appellant's statement of the point at issue in the lower Court, set forth in the Agreed Statement:

> "* * * the question to be determined by the trier of fact in the lower court was whether, as to the 334 cases of lobster, these were purchases by persons who dealt with the 'selling agent' of a foreign seller within the meaning of the Maximum Import Price Regulation." (R. 20.)

The *respondent's* brief stated the question again as follows:

> "The issue is as stated in the Appellant's Brief, whether these sales in December were made by Login as an independent seller * * *, or were made by Login as selling agent of the foreign seller * * *"

And again:

> "The parties having stipulated as to all the material facts, the sole issue left was whether from the facts shown the legal status of selling agent was made out, * * * and the resolution of this question was for the court, not the jury."

Certainly the respondent could not, *and indeed it never has,* contended that other issues or questions were at stake and the petitioner has failed to prove them. Its agreement left but one issue, namely, was Login a selling agent?

The petitioner presented the record by way of an Agreed Statement in reliance on the respondent's agreement in it that this question alone was to be reviewed. Respondent could not have asked affirmance of the judgment, *and indeed it did not,* on the grounds that the record does not prove other issues regarding "direct" dealings, or whether the lobster was "to be" imported.

Yet the opinion of the Court does just this. It affirms a judgment in favor of the respondent because of the failure of the Agreed Statement to prove other

questions removed from consideration by the respondent.

In justice, the petitioner submits it is entitled to one of two things:

Either the question submitted to the Circuit Court by the parties in reliance on Rule 76 should be determined and the judgment affirmed or reversed in accordance with its correctness, or

If the agreement of the parties under the Rule is to be disregarded, and the questions eliminated by it declared at issue, then petitioner is entitled to be heard on them and to present its defenses to them. It has, after all, demanded a jury trial on all issues. Thus far petitioner has not gotten beyond—in actual fact—a judgment entered after a ruling of the Court in pretrial conference. It has been denied a decision on the correctness of the ruling and has had the judgment affirmed on other grounds never passed upon by the trial Court. It is at least entitled to be heard upon them by a jury as it demanded.

The petitioner believes that the factual grounds stated by the Circuit Court in its opinion are contrary to the fact. It believes the Court's interpretation of the Maximum Import Price Regulation to require a "direct" dealing with a selling agent to be in error and contrary to the official declarations of the Price Administrator. This interpretation was never advanced by the Administrator; was never even mentioned in the case, much less argued prior to its anouncement in the opinion.

Petitioner does not here argue the correctness of these phases of the opinion because of its belief that they go to the merits of the case rather than to the wisdom of this Court granting the petition.

As the matter now stands the Circuit Court holds failure of the record to show two facts brings the sales within price control, when the *Price Administrator itself has agreed the actual fact is that the entire transaction*—not only so much of it as is shown by the stipulation—*but the transaction as it occurred in fact—was not within price control if the petitioner was a selling agent.* It, in effect, affirms the judgment against the petitioner on facts which the Price Administrator has agreed with the petitioner do not subject him to judgment.

Petitioner does not know if the scant attention given its petition for a rehearing—it was filed on Friday the 21st of June and denied on Monday the 24th—was because of the smallness of the amount involved. It does desire to clear its record of a violation of the Regulation it believes it is not guilty of, and has sought the aid of this Court to enable it to do so.

It respectfully urges that the refusal of the Circuit Court to hear the question submitted to it, and its resulting denial to the petitioner of an opportunity to be heard on the grounds on which judgment is entered against it so far departs from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power of supervision.

B. AN IMPORTANT QUESTION REGARDING THE RULES OF CIVIL PROCEDURE IS DECIDED BY THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the Circuit Court of Appeals denies to litigants the right, under Rule 76 of the Rules of Civil Procedure, to submit to it the question upon which a case was decided in the lower Courts and to secure a ruling as to the correctness of the Court's decision.

It requires an appellant who has done so to be prepared, by the record, to show that judgment should not have been entered on any ground whatever.

The Court's decision of this case makes Rule 76 of little or no value to litigants in the Ninth Circuit, and makes a waste of the time and effort required of counsel to enter into an Agreed Statement contemplated by the Rule. Rather than an aid to litigants the Rule becomes a dangerous entrapment.

The petitioner does not believe it was intended that the rule should be so used by the Courts.

The petitioner believes this to be an important question of federal procedural law which so far as it can find has not yet been settled by this Court. It urges that it should be, as well for the benefit of litigants and counsel generally, as for the petitioner.

Wherefore, the petitioner submits that the Circuit Court of Appeals for the Ninth Circuit erred in its

decision and that this petition for a writ of certiorari should be granted so that the decision can be reversed.

Dated, San Francisco, California,
September 20, 1946.

Respectfully submitted,

FRANCIS V. KEESLING, JR.,
Attorney for Petitioner.

FRANCIS CARROLL,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
September 20, 1946.

FRANCIS V. KEESLING, JR.,
Of Counsel for Petitioner.